

**“YOU SMOKE, YOU’RE FIRED!”  
LIFESTYLE, LAW, AND HIRING POLICIES:  
MAPPING OUT YOUR CORPORATE WELLNESS POLICIES**

**Nina G. Stillman  
Thomas Benjamin Huggett**

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**The Unbearable Heaviness of Hiring:  
Assessing the Legal Risks of Weight-Restriction Hiring Policies**

Obesity has become a national epidemic. In an effort to curb the trend, healthier living is being encouraged everywhere, from morning talk shows to fast food restaurants to government initiatives such as the recent revision of the food pyramid. While cultural and political influences purport to encourage healthier lifestyles, the reality is that the majority of the American population is overweight and many Americans are morbidly obese. In addition to the cultural stigma, overweight or obese individuals face bias in employment. It is no secret that there are real cost savings associated with a more physically fit workforce, including fewer health-related issues, lower rates of absenteeism, and, consequently, lower insurance premiums. Regardless of whether attendance, insurance or simple aesthetics motivate employers, the issue many employers are facing (and more employees are challenging) is whether discriminating against the overweight or obese in hiring is legal.

Review of applicable statutes, regulations and current case law indicates that there is conflicting and varying law on the issue of whether an employer may implement a policy that precludes the hiring of applicants who exceed designated weight restrictions. This arises from both: (1) varying interpretations of applicable federal law by different courts; and (2) varying state laws applicable to the issue. Much of this variance, particularly where federal law is at issue, arises from the highly fact-specific nature of the analyses performed by the courts, which are driven in part by the requirement under the Americans with Disabilities Act (“ADA”) that such analyses be performed on a case-by-case basis. Consequently, based on the current state of the law, an employer cannot be assured that a weight-restriction hiring policy will in fact withstand a specific legal challenge under federal law. Furthermore, it is possible that a weight-restriction hiring policy will also create disparate impact issues under Title VII, as statistical evidence shows that some protected groups are disproportionately overweight or obese.

Moreover, in the District of Columbia and Michigan, weight-restriction hiring policies expressly violate state law. In six other states — Idaho, Illinois, Maine, Montana, New York and Washington — the legislatures have enacted a broader definition of the term “disability” than

under federal law that may be interpreted by courts as encompassing the overweight or obese. Accordingly, the implementation of such a policy may be riskier in these states. The remaining jurisdictions largely follow federal law. Accordingly, this article will limit its examination to federal law.

## **I. OBESITY AS A DISABILITY AND DISPARATE TREATMENT ISSUE**

The ADA provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.” 42 U.S.C. § 12112(a). A “qualified individual with a disability” is defined as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). The ADA defines disability as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2).<sup>1</sup>

To establish a prima facie case of a discriminatory hiring practice, plaintiffs need to show that (1) they are disabled as that term is defined by the ADA; (2) they are qualified, with or without reasonable accommodation, to perform the essential functions of the job sought; (3) the employer was aware of the disability; and (4) they were denied the position. *Kincaid v. City of Omaha*, 378 F.3d 799, 804 (8th Cir. 2004); *Nedder v. River College*, 944 F. Supp. 111, 114 (D.N.H. 1996).

### **A. Obesity as a Disability.**

To assert a federal disability discrimination claim based upon failure to hire under a weight-restriction hiring policy, claimants would first have to establish that they are disabled under federal law. *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1453-54 (7th Cir. 1995). “[T]he inquiry is an individualized one, and must be determined on a case-by-case basis.” *Id.* at 1454. The Equal Employment Opportunity Commission (“EEOC”) guidelines, often cited by courts, state that obesity is considered a disability only under rare circumstances. 29 C.F.R. Pt. 1630 App. § 1630.2(j).

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<sup>1</sup> A “physical or mental impairment” means:

(1) [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2 (h).

Plaintiffs have succeeded in establishing obesity as a qualified disability under the ADA only where they are morbidly or severely obese or they suffer from a weight condition that is caused by a physiological condition.<sup>2</sup> *See, e.g., Cook v. Rhode Island Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 23 (1st Cir. 1993) (holding that jury could have found that morbidly obese plaintiff suffered physical impairment under the ADA).

Cases and agency guidelines indicate that *individuals who are merely overweight (i.e., neither morbidly obese nor severely obese due to a medical condition) and who are rejected for hire under a policy with a lower weight threshold (e.g., 30 percent over the recommended body weight) will be unable to establish a prima facie disability discrimination claim under the ADA on a disparate treatment theory because they will not be able to show that their weight is an impairment which substantially limits a major life activity. See Murray v. John D. Archbold Mem'l Hosp.*, 50 F. Supp. 2d 1368, 1378 (M.D. Ga. 1999) (upholding employer's weight-restriction hiring policy that precluded applicants with body weight in excess of 30 percent over the maximum desirable weight of large-framed men and women). However, *to the extent that a policy "captures" the morbidly obese and applicants with physiologically based weight conditions in its exclusion, those rejected applicants will likely be able to establish a prima facie case of disparate treatment disability discrimination under existing law unless an employer can demonstrate that those applicants cannot perform the essential functions of the job applied for.*<sup>3</sup>

#### B. Obesity as a "Regarded as" Disability.

Unlike other characteristics protected by discrimination laws, a claimant who is not a legally disabled individual may still be covered by the protections of the ADA if the claimant is able to show that he or she is "regarded as disabled" by the prospective employer.<sup>4</sup> Although some morbidly obese plaintiffs have been successful in asserting "regarded as" claims under the

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2 "Severe" or "morbid" obesity is defined as body weight more than 100% over the norm or more than 100 pounds over the recommended weight. *See* Elizabeth Kristen, "Addressing the Problem of Weight Discrimination in Employment," 90 Calif. L. Rev. 57, 59 n.6 (2002). "Severe obesity, which has been defined as body weight more than 100% over the norm . . . is clearly an impairment. In addition, a person with obesity may have an underlying or resultant physiological disorder, such as hypertension or thyroid disorder. A physiological disorder is an impairment." EEOC Guidelines § 902 "Definition of the Term Disability."

3 In effect, the 100 percent exclusion of disabled-obese applicants serves as the type of blanket exclusion policy which courts have found to be a "per se" violation of the ADA. "A per se violation is one in which an individual assessment of an individual's ability to perform the essential functions of the person's job with or without accommodation is not made by the employer." *Hammer v. Bd. of Educ.*, 955 F. Supp. 921, 927 (N.D. Ill. 1997) (citation omitted). *See also Bombrys v. City of Toledo*, 849 F. Supp. 1210, 1216 (N.D. Ohio 1993) (finding policy which prevents diabetics from being hired as police officers to be a per se violation of the ADA); *Bates v. United Parcel Serv., Inc.*, No. 99 Civ. 2216, 2004 WL 2370633, at \*23 (N.D. Cal. Oct. 21, 2004) (finding that policy which precludes all deaf applicants from being hired as drivers is a per se violation of the ADA).

4 *See* 29 C.F.R. § 1630.2(l). Therefore, even if a claimant were unable to establish that he or she had an *actual* impairment as defined by the regulations, a claimant could still make a viable ADA claim by showing that the prospective employer *regarded* the claimant as having a substantially limiting impairment. *See Connor v. McDonald's Rest.*, No. 02 Civ. 382, 2003 WL 1343259, at \*3 (D. Conn. Mar. 19, 2003) (holding that plaintiff stated claim under ADA where plaintiff alleged defendant regarded him as morbidly obese and substantially limited in major life activity of working).

ADA, research reveals no cases where merely overweight or obese plaintiffs sustained a “regarded as” claim.<sup>5</sup>

Therefore, with the exception of possible disparate impact claims discussed below, a hiring policy with weight restrictions for applicants that are well below morbid obesity levels should survive a challenge under the ADA by the vast majority of merely overweight applicants, who will be unable to show that the employer regarded them as being disabled. *Francis v. Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (“[N]o cause of action lies against an employer who simply disciplines an employee for not meeting certain weight guidelines.”).

### C. Obesity as a Title VII Disparate Treatment Issue

So long as an employer implements a weight-restriction hiring policy in a gender-neutral, race-neutral and national origin-neutral manner, the risk of a viable disparate treatment challenge to the policy under Title VII is minimal. To state a Title VII claim for disparate treatment, a plaintiff must show that an employer “simply treats some people less favorably than others because of their race, color, gender, religion, sex, or national origin.” *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

When evaluating weight-restriction policies, courts have found disparate treatment only in situations in which a company does not administer its weight policy in an even-handed manner. *See, e.g., Frank v. United Airlines*, 216 F.3d 845, 848 (9th Cir. 2000) (finding weight-restriction policy facially discriminatory where employer used different “frames” within height and weight tables to determine maximum allowable weights for its male and female employees).

## II. OBESITY AS A DISPARATE IMPACT ISSUE

A weight-restriction hiring policy may be susceptible to a disparate impact challenge under Title VII or the ADA. The Supreme Court has also recognized “[b]oth disparate treatment and disparate impact claims . . . under the ADA.” *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003). To state a claim for disparate impact, a plaintiff must “prove that the employer has a qualification that bears more heavily on disabled [workers] than on other workers and is not required by the necessities of the business or activity in question.” *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1195-96 (7th Cir. 1997).<sup>6</sup>

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5 *See Cook*, 10 F.3d at 23 (finding that jury could plausibly determine that plaintiff had physical impairment where she presented expert testimony that morbid obesity was physiological disorder); *Nedder*, 944 F. Supp. at 117-18 (finding that genuine issues of material fact existed as to whether employer regarded morbidly obese plaintiff as disabled); *but see Hazeldine v. Beverage Media, Ltd.*, 954 F. Supp. 697, 705 (S.D.N.Y. 1997) (finding that morbidly obese plaintiff could not present any evidence beyond conclusory allegations that employer regarded her as substantially limited in a major life activity).

6 Disparate impact claims under Title VII and the ADA use a burden-shifting analysis similar to disparate treatment claims. First, a plaintiff must make a prima facie claim of discrimination by (1) identifying a *facially neutral* employment practice or policy, (2) demonstrating that the practice or policy has a disparate impact on a protected group characteristic, and (3) demonstrating that a causal relationship exists between the practice or policy and the disparate impact on the protected class members. *See Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 574 (D.R.I. 1996). Once this adverse impact is shown, the defendant must demonstrate that the practice is

The EEOC's regulations on disparate impact liability (which are part of the Uniform Guidelines on Employee Selection Procedures) provide for a "four-fifths rule" that uses statistics to establish a disparate impact on the basis of race, gender or national origin. According to the EEOC regulations:

A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group.

29 C.F.R. § 1607.4(D).<sup>7</sup> Thus, in a disparate impact challenge, a weight-restriction hiring policy would likely be scrutinized under the four-fifths rule using statistics for weight. The Center for Disease Control ("CDC") provides statistics for the percentage of Americans who are overweight or obese using the Body Mass Index ("BMI"), broken down by gender, race and age. Applying CDC's statistics, when race and gender are taken together, the results raise the potential for disparate impact liability. Using the four-fifths rule, based on the CDC statistics, a weight policy could fail for (1) African-American females and Hispanic males compared to white males and females; and (2) Hispanic females compared to white females.

### **III. ERISA**

As a weight-restriction hiring policy is being contemplated in part in an effort to reduce healthcare claims, a job applicant who has been denied employment may attempt to bring an action under Section 510 of ERISA and/or the nondiscrimination provisions of the Health Insurance Portability and Accountability Act ("HIPAA"), which are incorporated into ERISA. However, based on the express language of the statute, it is doubtful that a job applicant would have standing necessary to bring an ERISA action. Moreover, even if a court were to determine that an applicant has standing, there is authority holding that ERISA Section 510 does not protect job applicants. Thus, the adoption of a weight-restriction hiring policy is not likely to result in increased exposure under ERISA.

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"job related" and "consistent with business necessity." *Allen v. City of Chicago*, 351 F.3d 306, 311 (7th Cir. 2003). If the employer establishes that the employment practice is job related and consistent with business necessity, the plaintiff can still prevail by showing that an alternative practice with a lesser adverse impact was available and the employer refused to adopt it. 29 U.S.C. § 2000e-2(k).

7 The Sixth Circuit Court of Appeals recently held that plaintiffs could demonstrate that a facially neutral policy still created a disparate impact even where it failed the four-fifths rule. See *Isabel v. City of Memphis*, 404 F.3d 404, 412 (6th Cir. 2005). However, plaintiffs must be able to use some other statistical analysis to demonstrate disparate impact.

#### **IV. REDUCING RISKS IF IMPLEMENTING A WEIGHT-RESTRICTION HIRING POLICY**

Should an employer proceed with implementing a weight-restriction hiring policy, at least in those states that do not expressly prohibit such action, the currently available law suggests that the employer may be able to reduce its legal risk, albeit not eliminate it, depending upon the weight threshold chosen for the hiring decisions and how the employer addresses morbidly obese applicants and those with weight problems caused by other physiological conditions.

**You Smoke, You're Fired:  
Assessing the Legal Risks of Smoking-Restriction Hiring Policies**

By Thomas Benjamin Huggett

It's no secret that smoking is bad for your health. The Surgeon General has been issuing warnings about adverse health effects caused by smoking for decades. Juries have begun awarding huge damages against tobacco companies for marketing dangerous products. Insurance companies have for years offered lower premiums on health and life insurance policies to nonsmokers. And in 1998 the attorneys general of a number of states settled their lawsuit with the tobacco companies for an expected \$246,000,000,000, to be paid over 25 years and used to attack the enormous public health problem posed by tobacco use. Given all these efforts to eradicate smoking and to eliminate the healthcare costs associated with them, many employers want to be more aggressive about reducing the increased healthcare costs they pay when their employees smoke. Thus employers are asking if they can do more than simply prohibit smoking in the workplace, up to and including refusing to hire employees that smoke.

Review of applicable statutes, regulations and current case law at both the federal and state levels indicates that while a prohibition on hiring smokers is likely to pass muster under a federal analysis, there are many states that either implicitly or explicitly prohibit discrimination against smokers. As discussed in more detail below, in the majority of states, the proposed policy will expressly violate state law. In the remaining states, there is little law on the issue and, accordingly, the level of risk that implementation of such a policy will engender can only be extrapolated from each state's historical paralleling of or deviation from similar federal statutes. Under this analysis, anti-smoking hiring policies may be permissible in these states.

**I. SMOKING AS A DISABILITY AND DISPARATE TREATMENT ISSUE**

The ADA provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.” 42 U.S.C. § 12112(a). Similarly, the Rehabilitation Act (“RHA”) provides that “[n]o otherwise qualified individual with a disability . . . shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a).<sup>8</sup> A “qualified individual with a disability” is defined as “an individual with a disability who, with or

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<sup>8</sup> As the courts apply the same standards while adjudicating claims under the ADA and the RHA, for the sake of clarity, the remaining analysis will be limited to the ADA. *See, e.g., Francis*, 129 F.3d at 285 n.4 (“Because the ADA and the RHA are very similar, we look to caselaw interpreting one statute to assist us in interpreting the other.”); *Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir. 1997) (“Because the standards under both of the acts are largely the same, cases construing one statute are instructive in construing the other.”); *Merchant v. Kring*, 50 F. Supp. 2d 433, 435 n.1 (W.D. Pa. 1999) (“The substantive standards for determining liability under the ADA and the RHA are the same. Therefore, where appropriate, we will analyze these claims together.”)

without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8).

The ADA defines disability as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2).<sup>9</sup>

To establish a prima facie case of a discriminatory hiring practice, plaintiffs need to show that (1) they are disabled as that term is defined by the ADA; (2) they are qualified, with or without reasonable accommodation, to perform the essential functions of the job sought; (3) the employer was aware of the disability; and (4) they were denied the position. *Kincaid*, 378 F.3d at 804; *Nedder*, 944 F. Supp. at 114.

#### A. Smoking as a Disability

To assert a federal disability discrimination claim based upon the failure to hire applicants who smoke tobacco, claimants must first establish that they are disabled under federal law. *Roth*, 57 F.3d at 1453-54. “[T]he inquiry is an individualized one, and must be determined on a case-by-case basis.” *Id.* at 1454. The EEOC maintains that smoking alone is not a disability, although nicotine addiction may still qualify. *See* 8 NDLR 62 (EEOC 1996) (“Smoking itself is not a disability because smoking is an activity, not an impairment. While addiction to nicotine may be an impairment, such a conclusion would not necessarily trigger ADA coverage . . . . [T]he Equal Employment Opportunity Commission has taken no position on whether nicotine addiction may be covered under the ADA.”). While case law on the issue is sparse, courts have generally held that smoking and/or nicotine addiction do not qualify as disabilities under federal law. *See, e.g., Brashear v. Simms*, 138 F. Supp. 2d 693, 695 (D. Md. 2001) (“[C]ommon sense compels the conclusion that smoking, whether denominated as ‘nicotine addiction’ or not, is not a ‘disability’ within the meaning of the ADA. Congress could

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<sup>9</sup> A “physical or mental impairment” means:

- (1) [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
- (2) [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities . . . .

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The term “substantially limits” means:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2 (h) and (j).

not possibly have intended the absurd result of including smoking within the definition of ‘disability,’ which would render somewhere between 25% and 30% of the American public disabled under federal law because they smoke.”).

To establish disability under the ADA, a smoker would have to show that his or her smoking is an impairment that substantially limits a major life activity. Courts have not found circumstances in which a smoker would be able to make this showing. *See Brashear*, 138 F. Supp. 2d at 695 (holding that because both smoking and nicotine addiction are “readily remediable,” neither qualified as a disability under the ADA); *U.S. v. Happy Time Day Care Center*, 6 F. Supp. 2d 1073, 1082 (W.D. Wis. 1998) (implying in dicta that smokers are not considered disabled absent medical or physical problems beyond smoking); *Doukas v. Metropolitan Life Ins. Co.*, No. Civ. 4-478, 1997 WL 833134, at \*4 n.3 (D.N.H. Oct. 21, 1997) (“[T]obacco users cannot qualify as disabled in the absence of a physical impairment or a perceived impairment.”).

Under the disparate treatment analysis, in the unlikely event a prima facie case could be established, an employer would then have to show that its anti-smoking policy was implemented for legitimate, nondiscriminatory business reasons. A desire to reduce costs associated with smokers that is predicated on the assumption that employees who smoke have more health-related conditions, which lead to greater insurance claims, greater absenteeism and increased injuries, is unlikely to be successful. Under ADA law, an argument can be made that this asserted legitimate nondiscriminatory business reason is, in fact, still a violation of the ADA because an employer would be using smoking as a proxy for other disabling medical conditions to which the employer apparently believes the smoker is susceptible, such as lung cancer or emphysema. In *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955 (10th Cir. 2002), the circuit court held:

The results of a medical inquiry or examination may not be used to disqualify persons who are currently able to perform the essential functions of a job, either with or without an accommodation, because of fear or speculation that a disability may indicate a greater risk of future injury, or absenteeism, or may cause future workers’ compensation or insurance costs.

*Id.* at 960 (citing EEOC Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act § 6.4 (1992)).<sup>10</sup> Therefore, a proposed policy which would exclude otherwise-qualified applicants from employment due to concerns about future increased insurance costs is unlikely to succeed as a legitimate nondiscriminatory business justification under the ADA for an employer’s refusal to hire applicants who smoke.<sup>11</sup>

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10 In an early disability decision under the RHA, the court found that fear of future health problems may not justify the rejection of otherwise-qualified disabled (including perceived disabled) applicants when the impairment did not at the point of hire impede the applicant’s ability to perform the job. *E. E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980) (finding that employer improperly rejected applicant from construction work because of fear that his congenital back anomaly would make him a risk for future back injury and its associated insurance costs to the employer).

11 Should an employer be able to establish a legitimate, nondiscriminatory reason for refusing to hire smokers,

## B. Smoking as a “Regarded as” Disability

Unlike other characteristics protected by our discrimination laws, a claimant who is not a legally disabled individual may still be covered by the protections of the ADA if the claimant is able to show that he or she is “regarded as disabled” by the prospective employer.<sup>12</sup> The EEOC has identified three circumstances in which a claimant would satisfy a claim for relief for discrimination under the “regarded as” definition of disability:

(1) [the applicant has] a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; (2) [the applicant has] a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or (3) [the applicant has] none of the impairments defined in paragraphs (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(1). Therefore, even if a claimant were unable to establish that he or she had an *actual* impairment as defined by the regulations, a claimant could still make a viable ADA claim by showing that the prospective employer *regarded* the claimant as having a substantially limiting impairment.

However, it is difficult to see how a smoker could state a “regarded as” claim under the ADA. It is unlikely that a potential plaintiff would be able to show that his employer regarded him as disabled merely because he was a smoker, and there is no federal case law to support such a claim. Indeed, the EEOC has stated, “[T]he fact that an employer knows or believes that someone smokes does not mean that the employer regards the individual as having an impairment (i.e., addiction) which substantially limits a major life activity . . . . No ADA coverage would be triggered under these circumstances.” 8 NDLR 62.

Therefore, an employer’s policy against hiring smokers should survive a disparate treatment challenge under the ADA brought by applicants who smoke, who will be unable to show that their employer regarded them as being disabled.

## C. Smoking as a Title VII Disparate Treatment Issue

So long as an employer implements its anti-smoking policy in a gender-neutral, race-neutral and national origin-neutral manner, the risk of a viable disparate treatment challenge to the policy under Title VII is minimal. To state a Title VII claim for disparate treatment, a

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the burden would shift back to a plaintiff to establish that the proffered reason is merely pretext for discrimination. It is unlikely that any analysis would ever reach this third stage of the burden-shifting paradigm, but if it did, it is unlikely that a plaintiff would be able to make such a showing.

12 Under the second prong of the definition of disability, claimants who do not have a present impairment that qualifies as a disability under the ADA may also be able to prevail if they can establish that they have sufficient record of such an impairment. There is very little case law dealing with the second prong of the definition, as plaintiffs without current impairments almost always attempt to proceed under the third “regarded as” prong. Research revealed no case law with respect to smoking and having a “record of such an impairment.”

plaintiff must show that an employer “simply treats some people less favorably than others because of their race, color, gender, religion, sex, or national origin.” *Teamsters*, 431 U.S. at 335 n.15. A neutrally implemented anti-smoking policy is likely to withstand any Title VII disparate treatment challenge.

## II. SMOKING AS A DISPARATE IMPACT ISSUE

It is possible, but unlikely, that a policy against hiring smokers would be susceptible to a disparate impact challenge under Title VII or the ADA. Although there is a dearth of ADA disparate impact decisions (and none dealing with polices against hiring smokers), the Supreme Court has recognized “[b]oth disparate treatment and disparate impact claims . . . under the ADA.” *Raytheon Co.*, 540 U.S. at 53. To state a claim for disparate impact, a plaintiff must “prove that the employer has a qualification that bears more heavily on disabled [workers] than on other workers and is not required by the necessities of the business or activity in question.” *Matthews*, 128 F.3d at 1195-96. See, e.g., *Horth v. Gen. Dynamics Land Sys., Inc.*, 960 F. Supp. 873, 881 n.10 (M.D. Pa. 1997) (noting that “relief will be awarded when such actions have the effect of discriminating against protected individuals and are not grounded in business necessity,” but finding that plaintiff could not make disparate impact claim); *Iacampo*, 929 F. Supp. at 574 (holding that plaintiff’s complaint had touched on all elements of a prima facie case enough to survive motion to dismiss, but noting that plaintiff “will have to produce far more concrete evidence if she hopes to survive summary judgment”).

Disparate impact claims under Title VII and the ADA use a burden-shifting analysis similar to that for disparate treatment claims. First, a plaintiff must make a prima facie claim of discrimination by (1) identifying a *facially neutral* employment practice or policy, (2) demonstrating that the practice or policy has a disparate impact on a protected group characteristic, and (3) demonstrating that a causal relationship exists between the practice or policy and the disparate impact on the protected class members. See *Iacampo*, 929 F. Supp. at 574. Once this adverse impact is shown, the defendant must demonstrate that the practice is “job related” and “consistent with business necessity.” *Allen*, 351 F.3d at 311. If the employer establishes that the employment practice is job related and consistent with business necessity, the plaintiff can still prevail by showing that an alternative practice with a lesser adverse impact was available and the employer refused to adopt it. 29 U.S.C. § 2000e-2(k).

The EEOC’s regulations on disparate impact liability (which are part of the Uniform Guidelines on Employee Selection Procedures) generally provide for a “four-fifths rule” that uses statistics to establish a disparate impact on the basis of race, gender or national origin. According to the EEOC regulations:

A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user’s actions have

discouraged applicants disproportionately on grounds of race, sex, or ethnic group.

29 C.F.R. § 1607.4(D).<sup>13</sup> Thus, in a disparate impact challenge, an anti-smoking policy would likely be scrutinized under the four-fifths rule using statistics for adult smokers. The American Lung Association offers statistics for the percentage of adult Americans who smoke broken down by gender, race and age. *See* Tab 1. For example, among Americans over the age of 18, 25.2 percent of men smoke, compared to 20.0 percent of women. Thus, for an employer with a policy against hiring smokers, approximately 75 of every 100 males would be eligible for hire, compared to 80 of every 100 females. Using the four-fifths rule, there would thus be no disparate impact based upon gender.<sup>14</sup>

There is also no disparate impact liability with respect to race for a policy against hiring smokers. According to the American Lung Association, 23.6 percent of whites smoke, compared to 22.4 percent of African-Americans, 13.3 percent of Asians and 16.7 percent of Hispanics. This means that with a policy against hiring smokers, approximately 76 of every 100 white applicants, 78 of every 100 African-American applicants, 87 of every 100 Asian applicants and 83 of every 100 Hispanic applicants remain eligible for hire. All of these numbers survive disparate impact analysis.<sup>15</sup>

Should a plaintiff or class of plaintiffs prove the elements of a disparate impact prima facie case, the employer must show that the exclusionary criteria are job-related and consistent with business necessity. 29 C.F.R. § 1630.14(b)(3). For the same reasons discussed above as to why such a policy is likely not to satisfy the legitimate nondiscriminatory business justification in a disparate treatment case, it will also be difficult for an employer to prove successfully that a policy against hiring smokers is job-related and predicated on business necessity.

There are additional difficulties an employer faces when having to prove that the restriction against hiring smokers is job related. First, if an employer is seeking to apply the restriction to all job classifications without conducting individualized assessments of the requirements of each job, it will be difficult to show that there are no jobs that could be performed by an employee who smokes. Second, if an employer does not intend to apply the

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13 The Sixth Circuit Court of Appeals recently held that plaintiffs could demonstrate that a facially neutral policy still created a disparate impact even where it failed the four-fifths rule. *See Isabel*, 404 F.3d at 412. However, plaintiffs must be able to use some other statistical analysis to demonstrate disparate impact. Research has not revealed any other statistical analysis of smoking habits that would demonstrate a disparate impact based on a protected characteristic.

14 75/80 equals 93.8 percent.

15 The American Lung Association statistics do show a claim for disparate impact liability with respect to Native Americans, 40.8 percent of whom smoke. Because a policy against hiring smokers would mean that only 59 of every 100 Native American applicants are eligible for hire, compared to 76 of every 100 Caucasian applicants, this policy would narrowly fail the four-fifths rule, as  $59/76 = 77.6$  percent. However, given the anticipated small number of Native American applicants, as well as the narrow margin by which this policy would fail the four-fifths test, we believe that it is unlikely that an employer would face a claim from Native Americans for disparate impact liability under Title VII.

nonsmoking requirement to incumbent employees, the employer implicitly acknowledges that the requirement is not a job-related requirement mandated by business necessity.

Yet another hurdle exists for an employer defending a disparate impact claim: even if an employer were able to establish job-relatedness, “a plaintiff may still show that a less discriminatory alternative test would serve the employer’s interest, and thereby defeat the attempt to invoke the defense.” *Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249, 1260 (9th Cir. 2001). Therefore, even assuming an employer could justify its policy against hiring smokers as a job-related business necessity, a plaintiff would still have the opportunity to show that there is a less discriminatory alternative. Such a less discriminatory alternative could be, for example, creating a smoke-free workplace.

### **III. ERISA**

Because smoking restrictions are contemplated in an effort to reduce healthcare claims, a job applicant who has been denied employment may attempt to bring an action under Section 510 of ERISA and/or the nondiscrimination provisions of HIPAA, which are incorporated into ERISA. HIPAA, enacted in 1996, amended ERISA to prohibit group health plans and issuers of group health coverage from discriminating against employee-participants based on their health status or the health status of their dependents. Specifically, among other things, group health plans and issuers of group health coverage cannot use “health status-related factors” to establish rules of eligibility.<sup>16</sup> However, based on the express language of the statute, it is doubtful that a job applicant would have standing necessary to bring an ERISA or HIPAA action. Moreover, even if a court were to determine that an applicant has standing, there is authority holding that ERISA Section 510 does not protect job applicants. Thus, the adoption of the proposed policy is not likely to result in increased exposure of an employer to ERISA litigation.

### **IV. THE LAW OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA**

Twenty-nine states, and the District of Columbia, have statutes and/or case law that prohibit discriminating against smokers, either explicitly or through a statute that prohibits an employer from considering an applicant’s lawful activity outside of work when making an employment decision. Employers located in these states cannot refuse to hire applicants who smoke on that basis alone.

The remaining 21 states do not have statutes or case law addressing smokers. In these states, state disability and discrimination laws generally mirror federal disability and discrimination laws, and a policy against hiring smokers is therefore likely to withstand discrimination claims.

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<sup>16</sup> The enumerated “health status-related factors” are health status; medical condition (including both physical and mental illnesses); claims experience; receipt of healthcare; medical history; genetic information; evidence of insurability (including conditions arising out of acts of domestic violence); and disability. *See* ERISA § 702(a), 29 U.S.C. § 1182(a).

## **Pass or Fail – Physically Testing Applicants: Assessing the Legal Risks of Physical-Testing Programs**

By Nina G. Stillman

Some employers have taken a different approach to fulfilling their desire to hire the healthy worker. Instead of using a societal health criterion such as weight or smoking, these employers have attempted to identify the physical stressors in their employees' jobs and develop testing protocols to determine if an applicant has the physical characteristics necessary to perform the desired job and to perform it safely. Because the legal principles with respect to physically testing applicants are neither highly developed nor consistent, employers wishing to implement these programs must be very careful at both the development and implementation stages of these testing programs. The decision as to whether or not to utilize applicant tests is an important one that will be different for every employer and situation.

### **I. APPLICANT TESTING LEGAL PRINCIPLES**

As a general proposition, enforcement agencies such as the EEOC and the Office of Federal Contract Compliance Programs ("OFCCP") do not like applicant testing where the tests result in an adverse impact on a legally protected class. Paper and pencil testing often has an adverse impact on African-Americans and may have an adverse impact on persons with limited English proficiency who are likely protected under the national origin discrimination prohibitions of our EEO laws. Physical ability testing, however, is more likely to have an adverse impact on women and older workers and inevitably implicates the ADA, particularly its "regarded as" disabled provisions.

Because of this suspicion among government enforcement agencies concerning applicant testing, it is imperative that the employer determine if the test will, in fact, result in an adverse impact on a protected class. If there is no adverse impact, then validation is not required as a matter of law. Consequently, the employer has to carefully and thoroughly question the test developer as to how it determined that the test does not result in adverse impact and explore whether that determination is transferable to its workplace. However, even if a test does not demonstrate adverse impact in another employment setting, the employer still must monitor the test in its particular workplace to ensure that its use does not result in adverse impact. The risk-averse employer can do this on a prototype basis before the test is implemented fully. Alternatively, the employer can implement the test and monitor it for adverse impact. Obviously, the latter approach carries a great deal more risk in that the employer may not learn of the adverse impact until a legal action has been initiated.

The employer should require a clear explanation *in writing* from the test vendor as to what the test is designed to show. Is the test designed to determine if an applicant is able to perform the essential functions of the job being applied for or is it a predictor of something else? If it is testing for the ability to perform the essential functions of the job applied for, that test will have the lowest potential for legal risk to the employer and can likely be content validated – the simplest and least costly form of validation. For example, if the job requires lifting 75-pound

bags of product 10 times an hour, then a test which requires the applicant to lift a 75-pound weight 10 times in one hour is content valid, even if there is an adverse impact.

If the test is a predictor of something else and is likely to result in an adverse impact on a protected class, then the validation process is more complicated and will likely necessitate validation under construct- and/or criterion-related validation principles. In this circumstance, the test is not designed to evaluate the applicant's ability to perform the specific functions of the job applied for; rather, it is a surrogate to show something else. For example, the test components not only test the ability to perform the job task, but are also designed to tell the employer something else about the applicant, such as the likelihood of success in the job or likelihood of performing the job without injury. In this testing circumstance, the employer needs to answer the following questions: (a) What factors have been determined to constitute success in the job? (b) How can it be shown that those factors truly measure success in the job? (c) How can it be shown that the test in fact determines whether the applicant possesses the characteristics that are needed for success in the job? (d) Does the test result in adverse impact on protected class members? (e) Can the test be validated? and (f) If there is adverse impact, is there an alternative selection method which will have a less adverse impact?

A legal challenge to a testing program can focus on some or all of these questions. It is important to note that an employer's inability to answer even one of those questions could prompt a court to invalidate the whole testing program. In that regard, many employers forget that, even if the test is validated, where an adverse impact on a protected class exists, the employer is obligated to consider whether it is possible to mitigate the adverse impact and whether less adverse alternatives exist.

Because the employer, if challenged, will have to show that there is no reasonable way to mitigate the adverse impact, it is critical to consider this issue early on to avoid the time and expense of validation. Here is where the employer will be required to adequately show how it measured success in the job. In one of the first adverse impact cases challenging a selection mechanism, an employer required a high school diploma for all entry-level jobs, including janitor positions. This diploma criterion resulted in an adverse impact on African-American applicants. The employer argued, among other things, that a high school diploma was a predictor, ultimately, of a more promotable employee. However, the employer was not able to show that the high school diploma was necessary for success in the janitor job. Accordingly, the diploma criterion was held to be illegal because it had an adverse impact on African-Americans and could not be justified by business necessity.

The employer, therefore, must be mindful that validation is not the end of the inquiry. If there is adverse impact and there is a legal challenge, the employer will have to show that the factors being tested for are, in fact, essential to the job, are justified by business necessity and cannot be evaluated through a means with a less adverse impact.

In addition to the fundamental elements of a testing program discussed above, every employer must also evaluate a testing protocol in terms of its application. Even if a testing protocol satisfies the legal requirements in design and validation, if the program is not applied consistently, its bona fides could be diluted and the entire program would be vulnerable to legal

challenge. As discussed above, if there is a legal challenge to a testing program, the employer may be called upon to defend the program on the ground that the test is required by business necessity. However, that argument is diminished if the test is not applied consistently. This circumstance often occurs with a test that has cut-off scores, i.e., if the applicant gets a passing or higher score, he or she is eligible for hire, but the applicant is rejected if his or her score is below the “pass” cut-off. The employer’s defense to this criterion is that the passing score is a surrogate for success in the job (or the ability to perform the job safely in the case of many physical testing programs) and that the test and the cut-off score have been validated. But if the employer finds that the validated cut-off score results in the rejection of too many applicants and starts changing the cut-off to acquire more employees, the testing process is called into question. In other words, if the validated cut-off scores are supposedly scientifically derived and required by business necessity, then the employer’s tinkering with those scores just to hire more employees undermines the scientific and business justification argument.

In considering consistency, the employer should also address whether it is prepared to apply the test to incumbent employees who transfer into the jobs for which applicants are tested. Many employers using selection tests do so only for applicants and do not require that incumbent employees be tested when they seek transfer into one of the jobs within the testing program. Often, the reluctance to test incumbents arises from the desire to avoid problems with a union. Even in the absence of a union, employers often do not test transferring incumbents because of expense or a general reluctance to test incumbent employees. However, employers should be aware that, if challenged, the failure to test transferring incumbents could dilute its business justification for the testing program. In other words, if the test is supposedly required by business necessity, how can the employer apply the test to only some and not all candidates for the jobs at issue?

A. Applicant Testing Guidelines

1. Determine what characteristics are being tested for.
2. Determine why it is believed that a test is needed to identify these characteristics.
3. Determine whether the employer is prepared to commit to consistent enforcement of the test and its outcomes, even if they result in a high rejection rate.
4. Determine if the time and expense of validating a test is worth it. In this regard, the employer may wish to compare turnover and performance rates in similar jobs where the test has not been used. Unless there is a demonstrable difference in these or other success measures, the cost of development, validation and implementation of a testing program and the legal risks associated with testing programs may not be justified on a cost/benefit basis.

5. Determine whether the characteristics being tested for can be justified as required by business necessity.
6. Determine if the test vendor is willing to give the employer, *in writing*, a clear statement as to what the test is designed to do; what the scientific basis for the test is; what, if any, adverse impact results from the test; how the test was validated; and what, if any, less discriminatory alternatives were explored and why they were rejected. Also, ask the vendor if its attorneys have prepared a legal opinion with respect to the testing protocol and review the opinion before committing to the test and the expensive validation process.
7. Determine if the test under consideration or one similar in nature has been legally challenged and review the decisions and outcomes of such legal challenges.
8. Determine if the employer is prepared to require that transferring incumbent employees be tested as well as applicants.

## II. CONCLUSION

When implemented, an applicant physical testing program is time-consuming, expensive and poses the potential for legal challenge on a variety of issues inherent to the process. Nevertheless, employers who are willing to follow the necessary steps have had good success when their testing programs are legally challenged. Accordingly, if an employer is considering a physical testing program, it need not be afraid to do so. However, it should not forget the maxim that “an ounce of prevention is worth a pound of cure.” In other words, spending the time at the outset with someone who is knowledgeable about these testing programs can well serve the employer and significantly minimize the legal risks attendant to their implementation.

### Selected Cases

*EEOC v. Rockwell Int’l Corp.*, 243 F.3d 1012 (7th Cir. 2001)  
*Lanning v. S.E. Pa. Transp. Auth.*, 181 F.3d 478 (3d Cir. 1999)  
*Pietras v. Bd. of Fire Comm’rs of the Farmingville Fire Dist.*, 180 F.3d 468 (2d Cir. 1999)  
*Correa v. Roadway Express Inc.*, 2003 WL 42143 (M.D.N.C. Jan. 2, 2003)  
*May v. Roadway Express Inc.*, 221 F. Supp. 2d 623 (D. Md. 2002)  
*Alspaugh v. Comm’n on Law Enforcement Standards*, 634 N.W.2d 161 (Mich. Ct. App. 2001)  
*City of La Crosse Police & Fire Comm’n v. Labor & Indus. Review Comm’n*, 407 N.W.2d 510 (Wis. Ct. App. 1987)